IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 222 of 1999
With
CRIMINAL APPEAL No. 245 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA : Sd/-

HONOURABLE MR.JUSTICE KS JHAVERI : Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHANABHAI JAMALBHAI PARMAR & 3 - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR in both appeals for Appellants.
MR HL JANI APP in both appeals Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 04/12/2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. Criminal Appeal No.222 of 1999 under Sec.374 of the Code of Criminal Procedure (`the Code' for short) has been filed by the appellants-original accused Nos.1 to 4 and Criminal Appeal No.245 of 1999 under Sec.374 of the Code has been filed by the appellant-original accused no.5, who have been convicted to suffer R.I. for life and to pay a fine of Rs.500/- each, in default, to suffer S.I. for 6 months for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code, to suffer R.I. for one year and to pay a fine of Rs.250/- each, in default, to suffer S.I. for 1 month for the offence punishable under Sections 143, 147, 148 read with Section 149 of the Indian Penal Code and to suffer R.I. for one year and to

pay a fine of Rs.500/- each, in default, to suffer S.I. for 1 month for the offence punishable under Sections 342 and 323 of the Indian Penal Code vide Judgment and Order dated 12th February, 1999 passed by the Learned Addl. Sessions Judge, Nadiad in Sessions Case No.301 of 1998. However, the Court below acquitted the present appellants-original accused nos.1 to 5 for the offence under Section 504 read with Section 149 of the Indian Penal Code and original accused nos.6 to 11 for the offence under Sections, 143, 147, 148, 323, 342, 302, 506 read with Sections 149 and 34 of the Indian Penal Code. However, the State has not preferred any acquittal appeal against the acquittal order and it becomes final.

2. The case of the prosecution in short is that on the day of incident, when the complainant and the deceased were passing through very near to the house of the accused nos.1 and 2 for going to their field, the accused started

abusing them and asked as to why they are passing through our house. At that time, the deceased replied that that is the way to go to his field and if the accused would not like, in future, he will not pass through that way and, thereafter, both had gone to their agricultural field. However, the accused nos.1 and 2 followed them and, thereafter, they dragged the deceased to the house of the accused no.1 from his field. They then called their friends and relatives and told that now the victim has become strong person and, therefore, today, we will kill him. At that time, the accused no.1 armed with iron rod, the accused no.2 armed with stick, accused no.3 armed with stick, accused nos.4 and 5 armed with iron road and other accused persons (original accused nos.6 to 11) armed with deadly weapons after making an unlawful assembly assaulted the deceased. On raising screams, the wife, mother and brother of the deceased came there and tried

to save the deceased. At that time, the accused nos.1 and 2 beat the mother-in-law of the complainant by iron rod and stick respectively and as a result of that, she received severe injuries and they left the scene of offence. Thereafter, some body informed the Police. In pursuance of that, the Police reached the scene of offence and took the deceased to J.B. Mehta Hospital, Kapadwanj for treatment in a Police jeep, but the deceased succumbed to the injuries on the way. Accordingly, the complaint came to be filed with Kapadwanj Police Station, which came to be registered as Kapadwanj Police Station I-C.R.No.110/1998 under Section 302 etc. of the Indian Penal Code. Thereafter, the investigation has been handed over to P.S.I. of Kapadwanj Police Station, Shri H.K. Rana (P.W.No.11, Exh.42). In pursuance of that, he started further investigation. He also prepared inquest panchnama (Exh.32) in presence of panchas, visited the scene of

offence and recorded the statements of various witnesses. On 26.07.1998, he drew the panchnama of scene of offence (Exh.31) in the presence of panchas. During the course of investigation, muddamal was seized by drawing panchnama to that effect and tried to catch the accused. On the very next day, the accused persons were found in the sim of Susaniya village and, thereafter, they were taken to Police Station and arrested by preparing panchnama to that effect. The accused persons produced the muddamal weapons used by them in the incident and same were seized by preparing panchanam to that effect along with the clothes worn by the deceased at the time of incident produced by the Police Constable and sent the same along with other muddamal to FSL. On receiving the postmortem note and other reports, same were kept in investigation file. Upon completion of investigation, he submitted the charge sheet against the accused before the Learned

Learned Judicial Magistrate, First Class, Kapadwanj, which came to be registered as Criminal Case No.1139/1998 for the offence under Sections 143, 147, 148, 149, 342, 323, 302, 504 read with Section 34 of the Indian Penal Code.

3. As the offence alleged against the accused was exclusively triable by the Court of Sessions, the learned Learned Judicial Magistrate, First Class, Kapadwanj committed the case to the Court of Sessions at Nadiad where it was numbered as Sessions Case No.301 of 1998 and transferred to learned Addl. Sessions Judge, Nadiad for trial. The learned Addl. Sessions Judge framed charge against the accused at Exh.3. The accused pleaded not guilty to the charge and claimed to be tried.

4. To prove the case against the accused, the prosecution examined 11 witnesses in all and produced 13 documentary evidence. The accused however did not examine any witness. On submission of closing purshis by the

prosecution, learned Addl. Sessions Judge, recorded the further statements of the each accused under Sec.313 of Cr.P.C. Thereafter, upon hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge, Nadiad, delivered the impugned judgment giving rise to file the present appeals.

5. As both the appeals arose out of the same judgment and order dated 12.02.1999 passed in Sessions Case No.301 of 1998 by the learned Addl. Sessions Judge, Nadiad, they were heard together and are being decided by this common judgment.

6. Heard learned counsel, Ms.Sadhana Sagar for the appellants-accused in both these appeals and learned APP, Mr.H.L. Jani, for the respondent-State in both these appeals. We have been taken to various oral as well as documentary evidence.

7. It has been mainly argued by the learned counsel for the appellants-accused, Ms.Sagar

that except the accused nos.1 and 2, other accused i.e. accused nos.3 to 5 have not taken any part in the crime in question and, therefore, the Court should take that aspect into consideration as their role is similar to the role played by the accused nos.6 to 11, who have been acquitted by the Court below. In this regard, she has taken us through the evidence of complainant viz., Savitaben (P.W.No.4, Exh.24), Fatabhai Hirabhai Parmar (P.W.No.5, Exh.26), Samuben Hirabhai (P.W.No.6, Exh.27) along with the FIR at Exh.25 and argued that there are contradictions in the evidence of the above referred witnesses on the material point and if their evidence is taken as it is where it is, then also, involvement of the accused nos.3, 4 and 5 has not been established. It has been further argued that other persons were not present at all at the time of incident, but they have been falsely involved into crime in question as they are the

relatives of the accused nos.1 and 2. It has been argued that there is a material contradiction regarding the time of the incident and the fact. After taking us through the evidences of P.W.No.2 viz., Pratapsinh Kohyaji at Exh.19, P.W.No.3 viz., Nagsinh Rupaji at Exh.20, P.W.No.4 viz., Savitaben Balabhai at Exh.24 and P.W.No.6 viz., Samuben Hirabhai at Exh.27, it has been argued that the P.W.Nos.2 and 3 reached the scene of offence at about 14:00 hours after receiving the telephonic vardhi, the P.W.No.6 is not the witness of incident and the P.W.No.4 has given only one name to the police personnel while traveling in the Police jeep to P.W.No.2 – Pratapsinh Kohyaji and she involved other accused later on. Lastly, it has been argued that all the witnesses are the relatives of the deceased and are interested witnesses and, hence, their evidence are not believable, not free from doubt and and trustworthy. Ms.Sagar has,

therefore, urged that the matter requires consideration and the judgment and order of conviction and sentence as pronounced by the Court below requires to be set aside.

8. Learned Additional Public Prosecutor, Mr.H.L. Jani has vehemently argued and supported the judgment in toto, for which, he has taken us through the evidence of above referred witnesses upon which reliance has been placed by the learned counsel for the appellants-accused and also taken us through the relevant portion of the impugned judgment delivered by the Court below. It is submitted that the wife, mother and brother of the victim are the witnesses of incident and their presence is natural one. Even, out of them, the mother of the victim has also received injuries in the incident in question, who has been treated into the hospital and, therefore, her presence may not be doubted. It is submitted that it is true that they could not save the deceased, but

the facts remain that the accused are strong headed persons, they followed the deceased into his field, dragged him to the house of accused no.1, tied him, removed his clothes and, thereafter, the deceased was beaten by the present appellants-accused along with other six accused with deadly weapons and killed mercilessly in the presence of wife, old mother and brother. Though these things were taking place, nobody could help to save the victim and, therefore, according to him, it was a merciless killing, wherein all the accused have taken active part and, therefore, while evaluating the evidence of the eye witnesses, the Court should keep in mind the above aspects of the matter and should interpret the evidence as a whole. Some minor contradictions in the evidence may not help the other side. It is also submitted that all witnesses are illiterate and poor villagers and, therefore, if the omission is not on the material point, same is required

to be ignored. It has been argued that the evidence of Pratapsinh and other Police Officers are not helpful to the other side, at the most it can be said regarding the time of the telephonic vardhi, but does not lead anywhere. It is submitted that while traveling in a Police Jeep, if the complainant spoke anything, it is required to be ignored. However, at the earliest, she has given FIR narrating the incident along with the role of accused persons in detail, which is required to be kept in mind. It has been submitted that the present appellants-accused are facing charge for the offence under Sections 143, 147, 148, 149, 342, 323, 302, 504 read with Section 34 of the Indian Penal Code. Once it has been established that they were the members of unlawful assembly and remained till the end by playing active role, no mercy may be shown to them. Learned APP, Mr.H.L. Jani, vehemently contended that as both the appeals do not merit any

consideration, they are required to be rejected.

9. We have gone through the oral as well as documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the respective parties.

10. It is required to be noted that for the purpose of deciding these appeals, important witness is the P.W.No.4, Savitaben Balabhai, Exh.24, who is the wife of the victim. According to her, she accompanied the deceased from very beginning till the incident was over as narrated by her in her evidence and at the earliest opportunity, she has filed the FIR, Exh.25 before Kapadwanj Police Station narrating incident in detail along with the role of each accused together with the weapons held and used by them, except, few things as stated by the Police Constable that she has given only one name while traveling. We can understand the mental

condition of an illiterate lady, whose husband has been dragged in her presence by the accused, removed his clothes, tied with the rope and, thereafter, beaten by the accused with deadly weapons. Whatever has been deposed by her before Pratapsinh has been deposed orally and for the first time in the Court, her statement has been recorded by the Investigating Officer and, therefore, we are not giving much weight to the evidence of Investigating Officer when we are having evidence of three witnesses, whose presence being quite natural has been established beyond reasonable doubt.

11. Simultaneously, second important witness is the mother of the deceased viz., Samuben Hirabhai (P.W.No.6, Exh.27). It is required to be noted that she is also the witness of incident and also received injuries in the alleged incident. The Investigating Officer has collected her injury certificate also and, therefore, her presence cannot be

doubted. She has also deposed the same version before the Court, which supports the say of the prosecution case. It is true that she is also an illiterate old lady and, therefore, her evidence is required to be believable as being found trustworthy and free from doubt.

12. Another important witness is Fatabhai Hirabhai Parmar (P.W.No.5, Exh.26), who is brother of the deceased. He also supported the prosecution case on material point.

13. We believe that P.W.No.4, Savitaben is the witness of incident from very beginning till end i.e. from their house to their field. First incident has taken place very near to the house of the accused no.1 and, thereafter, the accused followed them, dragged the deceased from the field and took him in the house of the accused no.1. Therefore obviously, the wife, who is working with the deceased in the field will follow him as it would be the natural conduct of any

woman being wife. Therefore also, we cannot doubt her version when she has deposed the same before the Court. She stuck to the same in her cross-examination also. Therefore, we believe that she is the witness of incident from beginning till end. It is also required to be noted that at the earliest, she has narrated incident in detail by way of FIR along with the respective role of each accused and the weapons held and used by them and on material point, nothing contrary has been come out from her evidence, which shake her evidence. It is true that she has not received any injury in the incident, but looking to the way in which the incident took place in the house of the accused no.1, where the husband of the complainant was tied with the rope after removing his clothes excepting nicker and beaten by 11 persons with deadly weapons, naturally she would not be in a position to enter in that house to save her husband except to cry in a helpless condition

in front of the house. Exactly that she has done by her. When the mother of the deceased tried to intervene, she has been beaten by the accused. In that process, she received injuries and, hence, she ran away from the scene of offence along with the wife and brother of the deceased.

14. We have gone through the evidence of above referred three witnesses and it is revealed that the incident started at about 10 o'clock and ended till 2 o'clock. Even the accused have not permitted to take the deceased to the hospital. Ultimately, somebody has informed the police by way of telephone. In pursuance of that, the police reached there and took the deceased to the hospital in a Police jeep along with the wife of the deceased, which is the agony of the wife of the deceased and other relatives and in that view of the matter, if she has forgotten something at that time of traveling in a jeep, it is required to be ignored because

her prime duty was to save her husband. At the cost of the repetition, we may say that her evidence is trustworthy and free from all doubts as she has deposed the role of each and every accused in detail in the FIR as well as in Court below. We believe her evidence in toto because there are no contradictions on the material point and the presence of accused along with the role has been established by the evidence of above referred three witnesses.

15. It is required to be noted that the witnesses and accused are neighbours or relatives residing in the same village and the incident took place in broad day light. Prior to the incident, the accused nos.1 and 2 have followed them, dragged the deceased from his field to the house of the accused no.1 and, therefore, question of falsely involving or misidentification may not be arisen at all. As stated above, all the accused have taken active role in the crime in question being

members of an illegal unlawful assembly from very beginning till end. Keeping in mind the above aspect, the Court below has convicted the present appellants-accused. Apart from the above, motive in the commission of offence has also been established beyond reasonable doubt.

16. It is also required to be noted that the panchnama of scene of offence (Exh.31), FSL report and other evidence also supports the case of the prosecution. FSL experts also opined that the blood stain found on the rope and knicker tally with the blood group of the deceased.

17. As far as the other accused persons i.e. original accused nos.6 to 11, who have been acquitted by the Court below are concerned, the State has not preferred any appeal. They have been acquitted at the time of pronouncement of the impugned judgment i.e. in the year 1999 and, hence, we are not inclined to issue any notice for enhancement

to do anything.

18. As far as homicidal death is concerned, the prosecution is able to prove the same by way of evidence of Dr.L.V. Asara at Ex.17, who performed postmortem on the dead body of the deceased on 26.07.1998. However, the learned counsel for the appellants-accused has not disputed the same and, therefore, we are not dealing with the same.

19. In view of the above, since there is no substance in any of the arguments advance by the learned counsel for the appellant-accused, these appeals are required to be dismissed.

20. Both these appeals are hereby dismissed.

21. Office shall place a copy of this judgment in each matter.

Sd/- *Sd/-*

(R.P.DHOLAKIA, J.) ***(K.S.JHAVERI, J.)***

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